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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/005,522	12/03/2001	Paul Theodore VanGompel	659/920	2410

7590

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EXAMINER

STEPHENS, JACQUELINE F

ART UNIT

PAPER NUMBER

3761

DATE MAILED: 05/18/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/005;522

Applicant(s)

VANGOMPEL ET AL.

Examiner

Jacqueline F Stephens

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 22 February 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 35-51 is/are pending in the application.
- 4a) Of the above claim(s) 49-51 is/are withdrawn from consideration.
- 5) ☒ Claim(s) 45, 46, 48 is/are allowed.
- 6) ☒ Claim(s) 35-44 and 47 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- ☐ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____
- ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- ☐ Notice of Informal Patent Application (PTO-152)
- ☐ Other: _____

DETAILED ACTION

Election/Restrictions

1. Newly submitted claims 49-51 are directed to an invention that is independent or distinct from the invention originally claimed for the following reasons: Newly submitted claims 49-51 are directed to a garment with fastening components capable of being moved from a secured to an unsecured position. The present invention was not originally claimed as a refastenable garment.

Since applicant has received an action on the merits for the originally presented invention, this invention has been constructively elected by original presentation for prosecution on the merits. Accordingly, claims 49-51 are withdrawn from consideration as being directed to a non-elected invention. See 37 CFR 1.142(b) and MPEP § 821.03.

Response to Arguments

2. Applicant's arguments filed 2/22/05 have been fully considered but they are not persuasive. Applicant argues Osborn does not teach mating fastener elements because the fastener elements 40 of Osborn are configured to engage either the undergarment itself or the other flap not to engage the opposite fastener element. It has been held that a "recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus satisfying the claimed structural limitations". *Ex Parte Masham*, 2 USPQ2d

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1647 (1987). The 'mating fasteners' does not provide a structural limitation, nor does it require the fasteners mate to each other.

Applicant argues Osborn teaches away from any dimensional requirements for the fastener elements. However, applicant does not provide support for this argument.

Applicant further argues that Osborn does not disclose or suggest that the fastener elements establish a predetermined deflection of the side edges and that Osborn is silent as to any actual or desired deflection of the pad. Firstly, a 'predetermined deflection' is limiting to any specific amount and can be no deflection or a substantial amount of deflection. Secondly, Osborn teaches the fastener elements are attached to the flaps and function to secure the pad to an undergarment, so Osborn teaches some desired deflection of the side flaps. The fastener elements of Osborn enable fastening of the pad to the user's panties and a predetermined deflection is any amount that would enable the fastener to adequately secure the pad.

Claim Rejections - 35 USC § 103

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

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4. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

5. Claims 35-44 are rejected under 35 U.S.C. 103(a) as being unpatentable over Osborn USPN 5346486.

As to claims 35 and 40-44, Osborn discloses a sanitary napkin that has an absorbent pad that comprises a cover 22, absorbent 26, and baffle 24. The article further comprises garment attachment panels 28 that extend from the underside of the garment (Figures 1A, 1B, 2A, and 6). The attachment panels have a control means 44 in combination with a fold 42 that provides lateral extension for the flap (col. 10, line 42 through col. 11, line 22). The control means is anchored under the crotch portion and extends generally downward and inward from an underside of the pad, and is capable of establishing a generally downward pull on the side edges in that it acts directly on the opposing spring to return the article to its retracted position, shown I Figure 5.

The attachment panels further comprise mating fastener elements 40. and does not disclose the claimed dimensions for the fastener elements. With respect to the

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recited dimensions for the fastener elements, they are considered obvious as one of ordinary skill in the art would appreciate the relative dimensions to solve the problem of attaching the sanitary napkin to a panty of a user. The sanitary napkin of Osborn will function the same if the fasteners are the claimed size or vary slightly from the claimed size, so this limitation does not patentably distinguish over Osborn. In *Gardner v. TEC Systems, Inc.*, 725 F.2d 1338, 220 USPQ 777 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 830, 225 USPQ 232 (1984), the Federal Circuit held that, where the only difference between the prior art and the claims was a recitation of relative dimensions of the claimed device and a device having the claimed relative dimensions would not perform differently than the prior art device, the claimed device was not patentably distinct from the prior art device.

Concerning claims 36-39, these claims are directed to an intended use of the article. Intended use must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. See *In re Casey*, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 136 USPQ 458, 459 (CCPA 1963). If the prior art structure is capable of performing the intended use, then it meets the claim limitations. The article of Osborn is fully capable of the claimed functional language.

6. Claim 47 is rejected under 35 U.S.C. 103(a) as being unpatentable over Osborn USPN 53446486 in view of Mattingly USPN 4608047. Osborn discloses the present invention substantially as claimed. However, Osborn does not disclose the means for

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anchoring the free portions are disposed on a bodyside surface of one of the garment attachment panels and on a garment side surface of the other of the garment attachment panels. Mattingly discloses a pad having a cohesive adhesive system and the flaps are designed to overlap and adhere to one another for the benefit of avoiding the problem of leaving adhesive residue on the undergarment (Mattingly col. 6, lines 44-65). It would have been obvious to one having ordinary skill in the art to modify Osborn with the claimed arrangement for the anchoring means for the benefits disclosed in Mattingly.

Allowable Subject Matter

7. Claims 45, 46, and 48 are allowed.

Conclusion

8. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not


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mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jacqueline F Stephens whose telephone number is (571) 272-4937. The examiner can normally be reached on Monday-Friday 9:00-5:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Larry Schwartz can be reached on (571) 272-4390. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


Jacqueline F Stephens
Examiner
Art Unit 3761

May 13, 2005


Larry I. Schwartz
Supervisory Patent Examiner
Group 3700